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**UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION**

In re

**CIRCUIT CITY STORES, INC., et al.**

Debtors.

Chapter 11

Case No. 08-35653 (KRH)

(Jointly Administered)

**CONDITIONAL OBJECTION OF TIVO INC. TO DEBTORS' FORTY EIGHTH  
OMNIBUS OBJECTION TO CERTAIN ADMINISTRATIVE EXPENSES AND 503(b)(9)  
CLAIMS AND MOTION FOR (I) AUTHORITY TO SETOFF AGAINST SUCH  
EXPENSES AND CLAIMS AND (II) A WAIVER OF THE REQUIREMENT THAT THE  
FIRST HEARING ON ANY RESPONSE PROCEED AS A STATUS CONFERENCE**

TiVo Inc. ("**TiVo**"), by and through its undersigned counsel, hereby objects (this "**Objection**") to the omnibus objection and motion (the "**Setoff Motion**") of the debtors in the above captioned case (the "**Debtors**"), entered on October 13, 2009 [Doc 5211]. TiVo is a prepetition and postpetition creditor of the Debtors and the holder of priority claims under sections 503(b) and 503(b)(9) (together, "**Administrative Expenses**") of title 11 of the United States Code (the "**Bankruptcy Code**"). This Objection is supported by the concurrently filed declaration of Lawrence A. Denny.

Through the Setoff Motion, the Debtors seek authority to offset Administrative Expenses with receivables owing to the Debtors both pre- and post-petition. TiVo objects to this setoff to the extent that the Debtors seek to offset Administrative Expenses with prepetition receivables before all postpetition receivables are exhausted through offset. To do otherwise would be inequitable, robbing creditors of their rights protected by section 553(a) of the Bankruptcy Code. Creditors are entitled to setoff prepetition claims against the Debtors' prepetition receivables. 11 U.S.C. § 553(a). TiVo does not object to the Setoff Motion if the Debtors will first setoff postpetition receivables against Administrative Expenses to the extent available, and only thereafter use prepetition receivables.

The Debtor's cite *In re TSLC I, Inc.*, 332 B.R. 476, 478 (Bankr. M.D. Fla. 2005) for the proposition that "a debtor's right to effectuate setoffs is among the offset rights preserved" by section 558 of the Bankruptcy Code. (Setoff Motion at 8). However, in *TSLC*, the court did not allow the debtor to offset prepetition receivables against postpetition administrative claims when the holder of the administrative claim also held a prepetition claim which could be used to offset prepetition claims of the debtor against the creditor. See *TSLC*, 332 B.R. at 478-79 (distinguishing *In re PSA, Inc.*, 277 B.R. 51 (Bankr. D. Del. 2002), *In re Papercraft Corp.*, 127 B.R. 346 (Bankr. W.D. Pa. 1991), and *In re M.W. Ettinger Transfer Co.*, 1988 Bankr. LEXIS 2720 (Bankr. D. Minn. 1988) because the postpetition creditors in those cases did not hold prepetition claims).

Section 553 of the Bankruptcy Code entitles a creditor to offset prepetition claims against prepetition receivables, and such receivables cannot be used to offset postpetition Administrative Expenses where doing so would prejudice the creditor. See *Id.* This setoff right has "substantial value." See *In re ABC-NACO*, 294 B.R. 832, 836-37 (Bankr. N.D. Ill. 2003). If the Debtors are allowed to setoff prepetition receivables against Administrative Expenses without first setting off post-petition receivables, TiVo would be materially harmed. After such a setoff, the Debtor could sue to recover any remaining pre- and post-petition receivables, and TiVo would have lost its right to offset prepetition receivables. Effectively, TiVo would be left with a prepetition unsecured claim, likely recovering pennies on the dollar as an unsecured claim holder, while

1 being forced to pay 100 cent dollars. Section 553 is specifically designed to prevent this  
2 situation.

3 Section 558 does not empower the court to strip a creditor's rights under section 553,  
4 which provides, in relevant part, that "this title does not affect any right of a creditor to offset a  
5 mutual debt owing by such creditor to the debtor" so long as both debts arose prepetition. 11  
6 U.S.C. § 553(a). The language of section 553(a) precludes impairment of a creditor's setoff  
7 rights through the Bankruptcy Code except as permitted under sections 553, 362 and 363.  
8 Accordingly, section 558 does not give the Debtors authority to impair TiVo's right to  
9 prepetition setoff under section 553 of the Bankruptcy Code.

10 The Debtors claim that a bankruptcy court also may have discretion to restrict setoff  
11 solely to priority claims, even if the creditor also holds an unsecured claim, citing *United States*  
12 *Internal Revenue Serv. v. Martinez (In re Martinez)*, 2007 U.S. Dist. LEXIS 6163 (M.D. Pa. Jan  
13 29, 2007). That case, however, was limited in its application to tax claims, and specifically,  
14 whether the bankruptcy court was empowered to restrict the allocation of the setoff even though  
15 allocation authority was given to the IRS by statute (under 26 U.S.C. §6402). *Martinez*, 2007  
16 U.S. Dist. LEXIS 6163 at \*2, \*8-\*10. Although the district court found that the bankruptcy  
17 court did not abuse its discretion in concluding that it had the authority to restrict setoff, the  
18 district court concluded that such a determination had to be based on specific findings  
19 demonstrating the equity of restricting setoff. *Id.* at \*11-\*12. Here, the Debtors have not even  
20 claimed any equitable basis for so restricting setoff, if such is their intent. Where the bankruptcy  
21 court based its equitable determination merely on "the facts of this case," the district court found  
22 an abuse of discretion and remanded the case to the bankruptcy court for a more detailed  
23 explanation of the reasons for restricting setoff. *Id.*

24 TiVo holds a prepetition claim for \$313,781.32 and a postpetition claim for  
25 Administrative Expenses totaling \$201,930.00. On information and belief, TiVo owes the  
26 Debtors \$562,868.84 prepetition, and based on the Setoff Motion, \$218,721.16 postpetition.  
27 Under the setoff structure TiVo proposes, the Debtors could at most recover \$265,428.68 from  
28 TiVo. However, if the Debtors are allowed to deprive TiVo of its setoff rights protected by

1 section 553 of the Bankruptcy Code, the Debtors could potentially recover \$579,210.00, and  
2 leave TiVo with a prepetition claim entitled to little or nothing under the plan of liquidation to be  
3 filed. Such treatment would cost TiVo \$313,781.32, and would not reflect the true balance of  
4 payables and receivables between the parties. Such treatment would also be inequitable.  
5 Accordingly, to the extent that the Debtors propose to do anything other than offset prepetition  
6 receivables against prepetition claims, and postpetition receivables against Administrative  
7 Expenses, to the maximum extent available, and only then setoff prepetition receivables against  
8 Administrative Expenses, TiVo strongly objects to the Setoff Motion.

9 For the reasons stated herein, TiVo respectfully requests that the Court either (i) deny the  
10 Setoff Motion, or alternatively, (ii) grant the Setoff Motion on the condition that TiVo's rights  
11 under section 553 of the Bankruptcy Code as described above are fully protected and will not be  
12 impaired.

13 Dated: November 3, 2009

Respectfully submitted:

14 LATHAM & WATKINS LLP  
15 Peter M. Gilhuly  
16 Ted A. Dillman

17 ZEMANIAN LAW GROUP  
18 Peter G. Zemanian

19 /s/ Peter G. Zemanian  
20 Attorney for TiVo Inc.

CERTIFICATE

I certify that on this 3<sup>rd</sup> day of November, 2009, I caused the foregoing *Conditional Objection of TiVo Inc. to Debtors' Forty-Eighth Omnibus Objection to Certain Administrative Expenses and 503(b)(9) Claims and Motion for (i) Authority to Setoff Against Such Expenses and Claims and (ii) a Waiver of the Requirement that the First Hearing on any Response Proceed as a Status Conference* to be filed with the e.c.f. system for purposes of electronic service on all parties so designated and also to be sent via Express Mail to:

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